IN THE

SUPREME COURT

OF THE

UNITED STATES

OF AMERICA

LEE CLARK,
Plaintiff in Error,
vs.
MONROE D. HERINGTON,
Defendant in Error.

Brief of Defendant in Error

We beg permission of the Court to refer to the report of this case in 56 Kansas, page 644 et seq., for a lucid and full statement of the facts out of which this litigation grew, and upon which the judgment of the Supreme Court of Kansas is based, and in which it is claimed here that Court erred, in not sustaining the contentions of the plaintiff in error, as is set forth in his petition for a writ of error to the State Court.

Printed record, pages 50 and 51.

At that time the Court remanded the case to the trial

court with directions to assess our damages. The trial court did not comply with this mandate, but proceeded to render judgment for the defendant, plaintiff in error, on the agreed statement of facts, as before.

This statement of facts appears at pages 15 to 18 of the printed record.

Upon our petition in error, the Kansas Supreme Court again reversed the trial court and remanded the case with directions to assess our damages. See 60 Kansas Reports, page 855, and pages 45 and 46 of the printed record.

For the third time the Supreme Court determined the case. See page 50, printed record. In a per curiam opinion the Court says in substance that it has three times decided the only questions of law presented, therefore declines to discuss them.

It is therefore necessary to look to the opinion in 56 Kansas, 644, to ascertain what the Court decides, and upon what facts it based its opinion.

The land in controversy is not within the place limits of the grant to the State to aid the construction of the M. K. & T. R. R., or rather its assignor, but is in the indemnity limits. See page 16, printed record, VI. statement of fact.

It is also within the limits of the prior grant to the Union Pacific R. R., Eastern Division, and is an even numbered section.

By the provisions of the act of Congress approved March 6th, 1868, 15 U. S. Statutes at Large, page 39, all even numbered sections within these U. P. grants were reserved as double minimum land. Notwithstanding this, the M. K. &

R. Co. selected this land as indemnity land. The selection was never approved by the Secretary of the Interior, as the granting act required. The selection was made October 22, 1877. See VII. statement of fact, page 17 printed record. The selection was not authorized by law, was in violation of the express provisions of the act of Congress of 1868 cited supra.

The Commissioner of the General Land Office canceled the selection for these reasons. See letter of the acting Commissioner, marked F, page 20 printed record, embodied in the agreed statement of facts. The defendant in error was evicted by the homestead entryman in whose behalf the selection was canceled. See 17th finding of fact, page 18 of the record.

An appeal was allowed the R. R. Co., but it did not avail itself thereof. See 21st finding of fact, page 18 printed record. Patent was issued to entryman October 15, 1890. Page 36 printed record.

In the statement of the case, in the brief of counsel for plaintiff in error, filed in the State Supreme Court, it is said: "It is admitted in the agreed statement of facts that the selection of land by the railway company was in all respects conformable to the rules of the department; that the proper fees had been paid and that a certificate in due form had been issued and delivered to the company. * * * No claim of a want of power or authority in the department is made."

Whether this will be again asserted in this Court we have no means of knowing at this time. The last part of our reply, on page 15 of the record, is to the contrary; our briefs have been to the contrary and it is not supported by the findings of fact except as to the first part.

The company selected the land in accordance with the rules of the department. This is covered by the seventh statement of fact. It is not admitted now, never was admitted, that the selection was approved by the Secretary of the Interior as required by section 1 of the granting act, nor that a certificate was issued. Neither have we ever admitted in any manner that the department had power or authority to make or approve the selection. On the contrary, we have always contended that there was no approval by the Secretary of the Interior,—that no certificate ever issued for the land. Our contention has always been, and now is, that the tract in controversy was not covered by the grant and that the selection was without lawful authority and in direct conflict with the act of Congress of 1868, cited supra.

This land was not within the grant proper, but within limits wherefrom indemnity land might be taken. It did not pass by the grant, but by selection. At the time the attempted selection was made this tract had by express act of Congress been withdrawn and reserved, so that it was beyond the jurisdiction of the department to make or approve a selection thereof, and hence the question of bona fide purchaser cannot arise. Until the selection was made and approved, the government retained the title and power of disposal the same as though no grant had been made. See U. S. vs. Mo. Pac. R'y Co., 141 U. S. 360-375, October term, 1891; K. P. Rld. vs. Atchison Rld., 112 U. S. 414-421; Barney vs. W. & St. P. Rly., 117 U. S. 228-232; S. C. etc. Rld. Co. vs. C. M. & St. P. Rld., 117 U. S. 406-408; Wisconsin R. R. Co. vs. Pierce, 133 U. S., pp. 512 to 514 inclusive; Wisconsin R. R. Company, 133 U. S., pp. 512 to 514.

It would seem that this point is pretty well settled When Congress passed the act of 1868, by which it expressly said to the Department of the Interior you shall not select indemnity land under the provisions of any act granting lands to the Union Pacific from the even numbered sections within the U. P. grant; these even numbered sections we reserve expressly and dedicate them to a specific purpose, and we fix the value at $2.50 or double minimum price, the land ceased to be public land. So we say the selection was absolutely without law, against express denial by law, and void.

The contention that Lee Clark was a bona fide purchaser as against the government and all persons claiming from it has no basis in fact to support it. The law was plain. The selection not only being without authority, but in express conflict with the law, could not support a claim of bona fide purchaser.

This Court has said that as to indemnity land it does not pass by the act, but by selection, and until selected is subject to be disposed of by Congress.

Could the Land Department by a mere exclusion of the public, in violation of the right of the government as above set forth by this Court, deprive the government of its title and right of disposition? The mere statement of the proposition is a sufficient refutation.

By the third contention some right is asserted under the act of March 3, 1887. The date of the eviction is July 31, 1886. Now we are at a loss to comprehend how Mr. Herington could in July, 1886, say to Cox, and the government, we will not yield the possession of the land; the Congress in 1887

is going to pass an act by which I may and will have the preference to enter this land under the provisions of that act which Congress is going to pass next year, etc.

The cause of action upon the covenant of warranty had accrued to the defendant in error. The homestead right of Cox had intervened. The act of Congress of 1887 did not operate retrospectively to deprive them of these rights. Had defendant in error remained in possession, and acquired title under the act of 1887, that title would not have been derived by or under or through the grant to the State of Kansas, but from the government directly, because of the wrongful or mistaken acts of the plaintiff in error and of the subordinate officers of the government in its behalf.

The government reserved redress for itself and purchasers against the company, whose wrongful acts it was endeavoring to correct.

I cannot find any grain of comfort for the company or plaintiff in error under this act, either as against the homestead entryman or defendant in error, who yielded to the authority of the government under the law as it existed and before the passage of the act under which the contention is set forth.

Respectfully submitted,

John H. Mahon

Attorney for Defendant in Error.

Seattle, Washington, January 27th, 1902.